STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

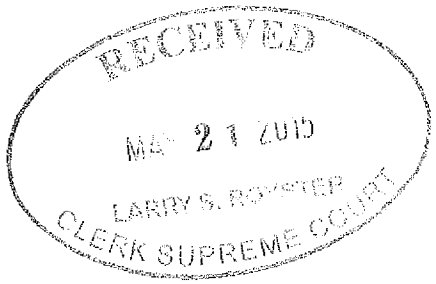
SEAN HARRIS,

Defendant-Appellant.
_____/

Docket No: 149872
COA: 317158
Wayne CC: 13-001620-AR

POLICE OFFICERS LABOR COUNCIL'S
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED



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STATEMENT OF QUESTIONS PRESENTED

Does MCL 15.391 *et seq* preclude the use of false statements by a law enforcement officer in a prosecution for obstruction of justice?

The District Court answered "Yes"
The majority of the Court of Appeals answered "No"
The dissention opinion of the Court of Appeals answered "Yes"
Defendant-Appellant answered "Yes"
The prosecution answers "No"
Proposed Amicus Curiae Police Officers Labor Council answers "Yes"

Do the waivers signed by the Defendants bar the use of their statements in a criminal prosecution as violative of state or federal rights against self incrimination?

The District Court and Circuit Court answered "Yes"
The majority of the Court of Appeals answered "No"
The dissenting opinion of the Court of Appeals answered "Yes"
Defendant-Appellant answered "Yes"
The prosecution answers "No"
Proposed Amicus Curiae Police Officers Labor Council answers "Yes"

BASIS OF JURISDICTION

The basis for jurisdiction is MCR 7.301(A)(2) which provides for the review of a case in which the court of Appeals has issued an opinion. The issues involve legal principles of major significance to the state's jurisprudence.

On February 4, 2015, this Court granted leave to appeal.

STATEMENT OF FACTS

(Copied with permission from Defendant-Appellant Hughes Brief on Appeal)

On November 19, 2009, at approximately 4:50 p.m., Police Officer Nevin Hughes and his partners, Sean Harris and William Little, were assigned to the Gang Squad Unit of the Detroit Police Department in plainclothes and in a semi-marked Detroit Police Department vehicle. At that time and date, an incident occurred in the parking lot of the Zoom gas station, located at 9100 Chalmers in the City of Detroit, that involved a civilian, by the name of Dujuan Lamar, and the above Detroit Police Officers. The incident resulted in the issuance of a traffic ticket to Mr. Lamar for driving without insurance. Since this incident did not result in an arrest or the confiscation of any evidence, no police reports were required to be filed by the police officers. The officers did note the incident on their activity log.

After issuing the ticket, the officers left the location. Mr. Lamar then called his mother and EMS. EMS conveyed him to St. John's Hospital, where he was prescribed Ibuprofin and discharged. Mr. Lamar did not have any injuries.

On or about November 19, 2009, Mr. Dejuan Lamar filed a complaint with the Office of the Chief Investigator[1] alleging excessive force and demeanor (CCR 40604; BPC 09-1598). Two months later, on or about January 11, 2010, Mr. Lamar provided a recorded statement about the incident to the Office of the Chief Investigator. In his statement, he claimed that he had been assaulted by Officer Nevin Hughes.

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[1] The Office of the Chief Investigator, an investigative arm of the Detroit Board of Police Commissioners is charged with investigating civilian complaints of violations of the Rules and Regulations of the Detroit Police Department. It does not investigate allegations of criminality. This is the role of Internal Affairs.

The Chief Investigator's Office did not transfer the case to Internal Affairs for investigation of criminality, but rather investigated the claims of Mr. Lamar for violations of the Department Rules and Procedures, with an eye toward bringing disciplinary charges against him if the allegations were sustained.

On July 20, 2010, Officer Nevin Hughes, the focus of this internal investigation, was interviewed by an investigator from the Office of the Chief Investigator. Prior to being interviewed, Officer Hughes signed a form entitled Certificate of Notification of Constitutional Rights - Department Investigation. The fourth paragraph of that form discussed the mandatory nature of this interview process and the consequences of refusal as follows:

> If I refuse to testify or to answer questions in relation to (a) my duties as a member of the Department, (b) investigations of violations of state and federal laws and/or ordinances of the City of Detroit, and/or (c) my fitness for office or the fitness for office of another member of the department, I will be subject to departmental charges which could result in my dismissal from the police department.

The fifth paragraph of that form guarantees each officer that his answers will not be used against him criminally:

> If I do answer, and immunity, federal, state, or other has not been given, neither my statements nor any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceeding.

In addition to the Certificate of Notification of Constitutional Rights form, Officer Hughes also signed a form entitled Reservation of Rights Addendum. The form contains the following language with respect to the mandatory nature of the interview process:

> I am giving the attached statement and/or preliminary complaint report by reason of receipt of an order from a superior officer threatening me with immediate suspension as well as other disciplinary action or refusal to obey.

> In view of the possible job forfeiture, I have no alternative but to abide by this order. However, it is my belief and understanding that the department requires this statement solely and exclusively for internal purposes and will not release it to any other agency. (Emphasis added).

After signing the forms, Officer Hughes was interviewed by an investigator of the Office of the Chief Investigator.

Other members of the Detroit Police Department were interviewed as part of this Departmental Investigation including Officers Sean Harris and Officer Wayne Little, the partners of Officer Hughes on November 19, 2009. At the conclusion of the investigation, the allegation of force was sustained and Departmental charges alleging Mistreatment of a Person were filed. These charges are found in Disciplinary Administration Number 11-0254.

A hearing on this charge was scheduled for August 19, 2011. At that time, the charge against the officer was dismissed for the reasons set forth on the Trial Board record and adopted by then-Chief Godbee.[2]

On September 15, 2011, Officer Nevin Hughes appeared at Professional Standards of the Detroit Police Department (a/k/a Internal Affairs). At that time, he was informed that he was the focus of a criminal investigation into allegations of Assault and Force, arising out of the complaint of Mr. Lamar on November 19, 2009. He was provided with his *Miranda* rights, he exercised those rights, and no statement was given.[3]

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[2] The mistreatment of a person charge, which was filed against Police Officer Hughes and which was dismissed, formed the basis for the Assault and Battery and Misconduct in Office charges for which Officer Hughes was bound over.

[3] *Garrity* rights were not given to Officer Hughes by Internal Affairs, as they were by the Office of the Chief Investigator, because he was now the focus of a criminal investigation.

On October 6, 2011, a warrant request was presented to the prosecutor's office naming your Defendant Nevin Hughes. Defendant Hughes was charged with Misconduct in Office, Obstruction of Justice, and Assault and Battery. Co-Defendants Sean Harris and William Little were charged with one count of Obstruction of Justice each.

Prior to the preliminary examination, it was stipulated by the parties and accepted by the examining magistrate that the sole basis for the Obstruction of Justice charges against all of the Defendants were their protected *Garrity* statements made to the Office of the Chief Investigator. A copy of the *Garrity* interviews were submitted for Judge Katherine Hansen's review and made part of the record.

The preliminary examination was completed on January 24, 2013, with the taking of testimony of the complainant. On February 1, 2013, the 36th District Court bound your Defendant, Nevin Hughes, over on Misconduct in Office and the misdemeanor of Assault and Battery and dismissed the Obstruction of Justice charge, finding in a well-reasoned opinion, that Officer Hughes' *Garrity*-protected statements in a criminal prosecution were prohibited by *Garrity v New Jersey*, 385 US 492 (1967); *People v Allen*, 15 Mich App 387 (1968) and MCL 15.393. Judge Hansen also indicated that the lower court had no authority to overrule either the State Legislature or the Michigan Court of Appeals. The charges against Officers Little and Harris were dismissed for the same reasons.

As indicated above, Officer Hughes was bound over on Misconduct in Office and Assault and Battery. A trial date was set before Judge Morrow. On the eve of the trial date, the people filed a motion to reinstate the Obstruction of Justice charge.

In an order dated May 6, 2013, the Honorable Bruce Morrow denied that motion as well as the people's request for a stay. Judge Morrow, in denying the motion, followed the well-reasoned opinion of Judge Hansen that the *Garrity*-protected statements are prohibited in a criminal prosecution.

The people filed an Application for Leave to Appeal and an Order to Stay the Proceedings which the lower court granted on or about June 3, 2013.

On July 15, 2014, in a two-to-one Decision, the Court of Appeals reversed the Circuit Court and remanded the case to the District Court for reinstatement of the Obstruction of Justice charge. The majority overruled *People v Allen*, 15 Mich App 387 (1968) and further ruled that MCL 15.393 did not apply in the instant case, finding that "the plain language of MCL 15.393 establishes that an 'involuntary' statement includes only truthful and factual information."[4]

In a dissenting opinion, Judge Wilder wrote that he agreed with the majority in overruling *Allen, supra*, but that MCL 15.393 barred the use of Defendant's involuntary statements in the instant case. He indicated that the Court of Appeals is bound to interpret the plain language set forth by the Legislature, even if we disagree with the results, and suggested that the Legislature revisit the statute.

Defendant-Appellant Hughes filed an Application for Leave to Appeal, asking this Court to reverse the Court of Appeals and reinstate the circuit court's order denying the People's Motion to Reinstate the Obstruction of Justice charge against Officer Hughes and thereby affirming the district court's dismissal of that charge. On February 4, 2015, this Court granted the Application for Leave to Appeal and ordered that briefs be

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[4] The Court of Appeals had the authority to overrule *Allen, supra*; and as such, the Defendant-Appellant Hughes limited his appeal to the application of MCL 15.393 to the instant fact situation.

submitted addressing: (1) whether MCL 15.391 *et seq* precludes the use of false statements by a law enforcement officer in prosecution for obstruction of justice; and (2) whether the waivers signed by the Defendants bar the use of their statements in a criminal prosecution as violative of state and federal rights against self-incrimination.

STATEMENT OF THE CASE

Detroit Police Officer Nevin Hughes was charged with Misconduct in Office, Assault and Battery, and Obstruction of Justice. After a preliminary examination, Judge Katherine Hansen of the 36th District Court dismissed count three, Obstruction of Justice and bound Nevin Hughes over on the felony of Misconduct in Office. The Assault and Battery count followed the Misconduct in Office charge to the Circuit Court. The matter was assigned to Judge Morrow of the Wayne County Circuit Court.

Shortly before the day of trial, the prosecution appealed the dismissal of the Obstruction of Justice charge (count three); and on May 6, 2013, Judge Morrow denied the Motion to Reinstate charge three. Judge Morrow also denied a Motion to Stay the proceedings.

The People filed an Application for Leave to Appeal and an Emergency Motion to Stay the Proceedings. The lower court granted this Application for Leave to Appeal and the Motion to Stay.

On July 15, 2014, in a two-to-one decision, the Court of Appeals reversed the Circuit Court and remanded the case to the District Court for reinstatement on the Obstruction of Justice charge. Defendant-Appellant filed an Application with this Honorable Court for Leave to Appeal the Decision of the Court of Appeals.

On February 4, 2015, this Court granted the Application and directed the parties to address the following issues: (1) whether the Disclosures by Law Enforcement Officers Act, MCL 15.391 *et seq*, precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice; and (2) whether the

waivers signed by the Defendants bar the use of their statements in a criminal prosecution as violative of state and federal rights against self-incrimination.

Interested persons or groups may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *People v Harris* only.

ARGUMENT I

MCL 15.393 PRECLUDES THE USE OF FALSE STATEMENTS BY A LAW ENFORCEMENT OFFICER IN A PROSECUTION FOR THE OBSTRUCTION OF JUSTICE.

The same concerns addressed in Garrity and by MCL 15.391 et seq. are at issue here, and should be resolved consistent with Supreme Court precedent. Normally, when suspects in custody face interrogation involuntarily, they have a right to silence that prosecutors cannot use against them in a criminal proceeding. In *Garrity*, police officers were questioned during an investigation concerning alleged ticket fixing. *Garrity v. New Jersey*, 385 US 493 (1967). Superiors ordered the officers to respond to questions and told the officers that refusal would result in discharge. The officers answered and their responses were used against them in subsequent criminal prosecutions. The Court summarized the competing concerns faced by police officers as choosing "between self-incrimination or job forfeiture." The Court concluded that compelling public employees to incriminate themselves is impermissible, stating: "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

Subsequent to *Garrity*, courts began to chip away at the right. In 2006, Michigan passed MCL 15.391 *et seq.* to preserve protections for law enforcement officers. If this Court adopts the majority Court of Appeals rationale here, officers could face the same decision as they would have before MCL 15.391 *et seq.* and *Garrity*: self-incrimination and job forfeiture. Here, as in *Garrity*, law enforcement officers must be granted the same level of constitutional rights as all other citizens.

The majority's reasoning that false statements cannot be "involuntary statements" under the statute is flawed and has broad implications. MCL 15.393 states: "An

involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding." "Involuntary statement" is defined in Section 1 as "information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." The legislature provided a definition of "involuntary statement" to narrow the definition to those generally known as *Garrity* statements—statements "compelled under threat of dismissal." The definition does *not* distinguish between true and false information.

When a statute is "clear and unambiguous," it "leaves no room for judicial construction and interpretation." *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 113; 659 NW2d 597, 600 (2003).

Interpreting "involuntary statement," to include only "true" information is contrary to both common sense and statutory construction. Section 3 carves out no exception to the prohibition against the use of an "involuntary statement." In fact, the statute goes further than protecting the statement itself and prohibits the use of "any information derived from that involuntary statement." Section 3 refers to "an involuntary statement made by a law enforcement officer," using the singular form of "statement" to capture the entire body of information shared by the officer, rather than using "true statements" as the legislature could have done. The prohibition in Section 3 against the use of derivative information likewise lacks any exceptions or limitations.

The majority argues that "misinformation" is not included in the term "information" under Section 1's definition of "involuntary statement." The majority goes

on to cite the definition of "information" to support this assertion. However, the definition of "misinformation" itself undermines the majority's analysis. *Webster's Dictionary* defines "misinformation" as "false or misleading information." The inclusion of the modifiers "false" and "misleading" indicate that the word "information" is commonly understood to mean both true and false information. Principals of statutory construction, codified under MCL § 8.3(a), require the Court to interpret words and phrases according to "the common and approved usage of the language." *See also Deur v. Sheriff of Newaygo Cnty,* 420 Mich 440, 445-46, 362 NW2d 698, 701 (1984).

The majority's conclusion that "involuntary statement" as used in Section 3 refers only to involuntary, *true* statements and excludes "false statement and lies"—spun to its conclusion becomes nonsense. First, the court arguably limits its holding to the use of false statements in "collateral offenses" under Section 3. However, there is no statutory reason to limit the application of this new definition of "statement" to other criminal proceedings, as Section 3 applies to any criminal proceeding. Section 3 states "in a criminal proceeding"—there is no language limiting this to collateral or non-collateral offenses. If the State can use any "false" information gathered from an officer's involuntary statement for a "collateral offense" against the officer, under the premise that MCL 15.393 only protects "true" information in a statement, the state can also use the information against an officer for a direct offense. This undermines the purpose of the Act. If an officer can be compelled to give a statement, and any information in the statement that the State does not think constitutes "knowledge communicated or received concerning a particular fact or circumstance" can be grounds for a criminal charge of

Obstruction of Justice (or other charges) against him or her, officers are in the same place as they were before MCL 15.391 *et seq* and *Garrity*.

Second, if "involuntary statements" excludes "false statements and lies" in one section of the statute, it will apply to other sections as well. "A statute must be read in its entirety and the meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole." *State Treasurer v. Wilson*, 423 Mich 138, 145, 377 NW2d 703, 707 (1985). Section 5 provides, "An involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. . . ." Applying the Majority's new definition of "involuntary statement" leads to the illogical conclusion that true statements must be kept confidential per Section 5 of the act, but false statements can be disseminated.

Third, the court does not limit the holding to *intentional* or *malicious* false statements, but simply finds that "false statements" can be used for obstruction-of-justice charges. Following the re-working of the definition of "involuntary statement" by the majority in this case, a false statement—so long as it is false, no matter if it was an intentional lie, a mistake or a misstatement—can be used against the law enforcement officer in any criminal proceeding. And, it can be exempt from the confidentiality provisions of the Act as well. This is false, and comes from a failure to look at the Act in its entirety.

Furthermore, this interpretation undermines what the Majority opinion stated as the "Legislature's manifest intent" to "create a mechanism for facilitating *internal* police investigations." (emphasis added). The Majority seeks to use *false* statements against an

officer contrary to Section 3. This leaves open the question of whether false statements are exempted from Section 5's confidentiality provisions, contrary to the purpose of the statute to facilitate *internal* investigations, but consistent with the Majority's new definition of "involuntary statement." This could mean information from *Garrity* statements of law enforcement officers deemed "false" could be used in ways entirely unrelated and unconnected to internal investigations. This is likely to result in a less cooperative mechanism harming internal police investigations.

ARGUMENT II

THE WAIVERS SIGNED BY THE DEFENDANTS BAR THE USE OF THEIR STATEMENTS IN A CRIMINAL PROSECUTION AS VIOLATIVE OF STATE OR FEDERAL RIGHTS AGAINST SELF-INCRIMINATION

Before he was interviewed, Officer Hughes signed a Certificate of Notification of Constitutional Rights—Departmental Investigation and a form entitled Reservation of Rights Addendum. The Detroit Police Department prepared the forms. The Certificate of Notification stated in relevant part:

> If I do answer, and immunity, federal, state, or other has not been given, neither my statements nor any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceedings.

Contract interpretation requires courts to follow the plain meaning rule. Here, the language is even more clear than MCL 15.393; "any information" gathered cannot be used in "any subsequent criminal proceedings." There is no ambiguity that this includes *false* information. When a contract is unambiguous, courts should enforce it as written. *See, e.g., Holland v. Trinity Health Care Corp.*, 287 Mich App 524, 527–28; 791 N.W.2d 724, 727 (2010); *Farm Bureau Mutual Ins Co of Michigan v. Nikkel*, 460 Mich 558, 570;

596 N.W.2d 915, 921 (1999). However, even if the Court finds the language ambiguous, the court should use the common-law rule of *contra proferentem*, and construe the ambiguity against its drafter—in this case, the Police Department. *See Holland*, 287 Mich App at 527–28. The officers relied upon the contracts. The officers likely would not have given statements if they had known that prosecutors could use the statements against them in a subsequent criminal proceeding, contrary to the signed contracts. Allowing the Police Department to break the contract and use the statements would violate the state and federal rights against self-incrimination. If the protections in the contract are ignored and the use of the statements is allowed, officers will have essentially been tricked into giving up their Fifth Amendment right to silence due to the promise of the contract to restrict the use to *internal* investigations.

A finding that to MCL 15.391 *et seq.* and the waivers signed by the defendants do not bar the use of their statements in a criminal prosecution will create significant public policy problems. As scrutiny of law enforcement officers by the public has increased in recent times, the importance of internal investigations of law enforcement agencies is extremely high and the risk to individual officers in assisting these investigations is great. Allowing the use of *Garrity* statements to be used against the officer who made the statement will inhibit the internal investigations the State is purporting to be protecting. As the Court of Appeals majority stated: "the Legislature's manifest intent was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts." If law enforcement officers know that statements compelled under the threat of job termination or suspension can be used against him or her in a criminal proceeding—despite any waiver he or she may sign—

officers will be less forthcoming so as not to risk a subsequent charge for obstruction of justice or other criminal proceeding. This concern is even greater under the Court of Appeals' rationale that the only "involuntary statements" that are protected are "true" statements, which would exclude mistaken but false statements from protection. Further, this interpretation is unnecessary for holding officers accountable. If the law enforcement agency wants to interrogate an officer suspected of a crime, the agency can treat the officer as it does any other person suspected of a crime. The agency can Mirandize the officer and interrogate them. It is only fair that our law enforcements officers are given the same protection as all other Michiganders.

CONCLUSION

The Majority opinion's conflation of the meaning of "statement" and "information" are contrary to basic statutory interpretation. MCL 15.391 *et seq.* precludes the use of false statements by a law enforcement officer for obstruction of justice, or any other criminal charge. The waivers signed in this case clearly and unambiguously prohibit the use of the involuntary statements in a criminal prosecution.

Respectfully submitted,

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Dated: May 20, 2015

Amicus Curiae